specific thing, its continued existence is usually the subject of a condition,[11] normally excuse performance, if the subject-matter of the contract is requisitioned by the government.[12]

An interesting variation of the usual problems in this class of cases was presented by the recent case of *Mitsui & Co.* v. *Watts, Watts, & Co.* (Ct. of App. 1916) 115 L. T. R. 248. The defendants contracted to send a ship to Mariopol, and load a cargo for the plaintiffs, "restraints of princes" excepted. Erroneously thinking that the voyage was already illegal, defendants failed to perform, and claimed on the trial that a reasonable belief that the expected outbreak of the war would render such voyage illegal served to excuse them. It was held that a reasonable apprehension of something which, if it happens, will excuse performance, is insufficient as an excuse. It might, perhaps, have been argued that the defendants took the risk of events so occurring subsequently that they would have been absolved from complete performance even had they sent the ship to Mariopol, and that the risk had eventuated in their favor; but the court took the sounder view that the defendants were absolutely bound to perform their contract, unless legally excused prior to the time of breach.

SEPARATION AGREEMENTS.—When the English Ecclesiastical Court, in which was vested jurisdiction over marriage questions, had to deal with separation agreements, it declared them wholly void as violative of the sacred nature of the marriage relationship,[1] and never during its entire history, until its abolition in 1857, did it grant to such agreements any sanction whatsoever.[2] The equity courts, on the other hand, did uphold them, even in the eighteenth century, at least to the extent of enforcing provisions for the separate maintenance of the wife,[3] since they considered themselves able to do this without coming into conflict with the ecclesiastical jurisdiction. It was not, however, until early in the nineteenth century that any clear rule was enunciated, and then it became settled in both law and equity courts that, where separation had in fact occurred, or was to occur immediately,[4] provisions made between the husband and a trustee for the wife[5] to insure her a separate maintenance were enforcible obligations, even where such stipulations were merely accessory to a main agreement for separation which was non-enforcible as against public policy.[6]

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[11]Wald's Pollock, Contracts (Williston's ed.) 536.

[12]*In re* Shipton, Anderson & Co. [1915] 3 K. B. 676; see Graves *v.* Miami Steamship Co., *supra.*

[1]Mortimer *v.* Mortimer (1820) 2 Hagg. Con. 310; Westmeath *v.* Westmeath (1827) 2 Hag. Eccl. Sup. 1, 115.

[2]See Foote *v.* Nickerson (1900) 70 N. H. 496, 498, 48 Atl. 1088.

[3]Seeling *v.* Crawley (1700) 2 Vern. *386; Angier *v.* Angier (1718) Pre. Ch. 496; Guth *v.* Guth (1792) 3 Bro. C. C. 614; see Fletcher *v.* Fletcher (1788) 2 Cox *99, *102; but see Foote *v.* Nickerson. *supra,* 500.

[4]If the agreement looked to a possible separation *in futuro* it was wholly void. Durant *v.* Titley (1819) 7 Price, 577; *contra,* Rodney *v.* Chambers (1802) 2 East, 283.

[5]The trustee was necessary because of the common law unity of husband and wife. See Legard *v.* Johnson (1797) 3 Ves. Jr. *352, *358.

[6]Worrall *v.* Jacob (1817) 3 Mer. 256; Jee *v.* Thurlow (1824) 2 B. & C. 547; Frampton *v.* Frampton (1841) 4 Beav. 287; see Warrender *v* Warrender (1835) 2 Cl. & F. 488, 527.

This anomalous doctrine, objected to by the very judges who decided the cases,[7] was finally eliminated in England as the result of a "judicial somersault".[8] The House of Lords in a notable case decreed specific performance of a separation agreement, one provision of which was that the wife was to live separate, and thus cleared the way for the enforcement in such agreements of that covenant which had from the very beginning, on the ground that it was against public policy to allow private interference with the marriage relationship, received no sanction from either the law, equity, or ecclesiastical courts.[9] Though it may be questioned how far this result was actually intended, the scope of the decision was later extended,[10] and in subsequent cases the new doctrine was applied in various ways[11] on the ground that the better public policy was to encourage the private settlement of marital difficulties.[12] Even the trustee was finally eliminated in the complete modernization of the doctrine.[13]

The American courts are in direct conflict with this present English theory and have always followed the earlier view.[14] The rule, as laid down in most of the jurisdictions, is that if a separation has occurred, or is to take place immediately, an agreement for separation will be enforced, if its provisions are fair and it is free from fraud or duress.[15] By this the judges seem to mean that any stipulation for separate maintenance in such agreements will be enforced, but it is clear on authority that the stipulation to separate or to continue to live separate will not be carried into effect by the courts.[16] With a few variations[17] this doctrine is law throughout the United States.

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[7]See Worrall *v.* Jacob, *supra;* Westmeath *v.* Westmeath (1821) Jac. Rep. 126, 142; Ross *v.* Willoughby (1822) 10 Price, 2.

[8]1 Bishop, Marriage, Divorce, & Separation, § 1263.

[9]Wilson *v.* Wilson (1848) 1 H. L. Cas. 538.

[10]In Wilson *v.* Wilson (1854) 5 H. L. Cas. 40, the second decision by the House of Lords on the leading case, the court supported an order approving a separation deed as drawn by the master, though it contained a clause to prevent suit by the husband for the restitution of conjugal rights, on the ground that such a clause was essential to protect the right of the wife to live separate.

[11]Husband enjoined from molesting wife, Sanders *v.* Rodway (1852) 16 Beav. 207; suit for restitution of conjugal rights enjoined, Hunt *v.* Hunt (1862) 4 DeG., F. & J. *221; Besant *v.* Wood (1879) 12 Ch. D. 605, where court also held agreement barred suit for judicial separation brought in violation of the contract; suit for restitution of conjugal rights barred, Clark *v.* Clark (1885) 10 P. D. 188.

[12]See Besant *v.* Wood, *supra,* 620.

[13]McGregor *v.* McGregor (1888) 21 Q. B. D. 424; Sweet *v.* Sweet [1894] 1 Q. B. 12.

[14]11 Columbia Law Rev. 378.

[15]Nichols *v.* Palmer (Conn. 1811) 5 Day, 47; Walker v. Walker (1869) 76 U. S. 743; Bowers *v.* Hutchinson (1899) 67 Ark. 15, 53 S. W. 399.

[16]Aspinwall *v.* Aspinwall (1892) 49 N. J. Eq. 302, 24 Atl. 926; Baum *v.* Baum (1901) 109 Wis. 47, 85 N. W. 122; see Smith *v.* Knowles (Pa. 1853) 2 Grant Cas. *413.

[17]A few jurisdictions require a sufficient cause for the separation. Stebbins *v.* Morris (1897) 19 Mont. 115, 47 Pac. 642; Boland *v.* O'Neil (1899) 72 Conn. 217, 44 Atl. 15; see Archbell *v.* Archbell (1912) 158 N. C. 408, 74 S. E. 327.

The requirement as to a trustee has varied in the different jurisdictions according as the power of married women to contract has varied.[18]

A recent application of the American doctrine is to be found in *Landes* v. *Landes* (1916) 94 Misc. 486, 159 N. Y. Supp. 586 (affirmed on different grounds, 172 App. Div. 758, 159 N. Y. Supp. 230), in which it was held that, where a wife had sued for separation, a separation agreement, though valid in its pecuniary features, could not bar the suit, seemingly because the wife had no such enforcible right to a separation as would make judicial action nugatory. The correctness of the decision depends upon whether the New York doctrine is like the general American position. It is clear that maintenance provisions are enforcible where the agreement is made, as it was here, after separation.[19] However, the status of the promise to separate is doubtful. If the court is correct that the stipulation concerning separation is invalid in New York,[20] then clearly an agreement could not obtain for the wife what she could obtain by judicial decree. If however, the English doctrine has been introduced,[21] then the wife, having had an election between the contract and the suit and having chosen to make the contract, ought, since she has an enforcible right to separation, to be held to her election and barred from suit. The question involved has received little attention in this state, but, taking into account the general American doctrine, as well as certain holdings in New York, indicative of a dislike of such agreements,[22] it seems unlikely that the courts would adopt the English view. This is regrettable, inasmuch as it would seem the better public policy to encourage a private settlement wherever possible, provided that the agreement did not in itself conduce to a separation *in futuro*. At any rate, the courts would in this way avoid the illogical position of enforcing stipulations for separate maintenance, which would never have been entered into except to facilitate the objectionable main purpose.[23]

ADMIRALTY JURISDICTION OVER VESSEL UNDER REQUISITION BY FOREIGN NATION.—A necessary adjunct of the idea of sovereignty is the principle that the state should not and cannot be sued in its own courts

[18]See Archbell *v.* Archbell, *supra.*

[19]Galusha *v.* Galusha (1889) 116 N. Y. 635, 22 N. E. 1114; Winter *v.* Winter (1908) 191 N. Y. 462, 84 N. E. 382.

[20]Gilbert *v.* Gilbert (1893) 5 Misc. 555, 26 N. Y. Supp. 30; see Beach *v.* Beach (1842) 2 Hill 260, 264.

[21]*Cf.* Dowling, J., in Landes *v.* Landes (1916) 172 App. Div. 758, 159 N. Y. Supp. 230. Certain dicta seem to support the English view. See Pettit *v.* Pettit (1887) 107 N. Y. 677, 679, 14 N. E. 500; Duryea *v.* Gilvin (1890) 122 N. Y. 567, 570, 25 N. E. 908.

[22]In spite of the decision in Clark *v.* Fosdick (1889) 118 N. Y. 7, 22 N. E. 1111, the Appellate Division, *contra* to the American rule, has frequently refused to enforce even the maintenance provisions in an agreement where the separation in fact occurred immediately after the contract was made. Sunderlin *v.* Sunderlin (1908) 123 App. Div. 421, 107 N. Y. Supp. 979, and cases cited. Clark *v.* Fosdick is distinguished on the ground that the agreement was there between husband and trustee, and not between husband and wife.

[23]New Hampshire refuses to enforce any of the agreement. Foote *v.* Nickerson, *supra,* discussed in 1 Columbia Law Rev. 555; Hill *v.* Hill (1907) 74 N. H. 288, 67 Atl. 406. This was the rule in North Carolina, Collins *v.* Collins (1867) 62 N. C. 153, but it has been changed by statute. See Archbell *v.* Archbell, *supra.*